United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7622

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

JAY JULIEN,

Plaintiff-Appellant,

—against—

SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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JAY JULIEN,

Plaintiff-Appellant,

-against-

SOCIETY OF STAGE DIRECTORS AND CHOREOGRAPHERS, INC.,

Defendant-Respondent.

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REPLY BRIEF OF PLAINTIFF-APPELLANT

POINT I

DEFENDANT'S CLAIM THAT DIRECTORS ARE EMPLOYEES IS CONTROVERTED BY TESTIMONY OF DEFENDANT'S WITNESSES

To oppose plaintiff's contention that a Director is an independent contractor, defendant's brief claims that a Director does not have a right of cast approval unless he negotiates it specifically in his contract. It is submitted that even if this were so, it would not detract from the fact that the manner in which a Director performs his work is not subject to control. It is not disputed that whether there is "the right to direct the manner in which the business shall be done", is the standard which

determines whether a Director is an independent contractor or an employee. (Singer v. Rahn, 132 U. S. 518; Taylor v. Local 7, 353 F 2d 593, 4th Cir., Cert. denied, 384 U. S. 969.) A Producer does not have this right, even with respect to casting. The testimony of Alan Schneider, a Director, and the defendant's witness, on who selects the cast, was:

> "I mean, I have to agree to the actors, the author has to agree to the actors and normally the producer has to agree." (238A-239A)

And, when Mr. Richards, defendant's current president was asked how the decision was made as to which actors would get the parts, he answered: "The decisions were always made in concert. ..." (83A). In short, at the least, according to defendant's witnesses, a Director is co-equal with the Producer and playwright. The Producer does not have the right of control.

Even more significant than the original hiring of the cast, the defendant's witnesses have testified that a Director is not required to accept the decision of a Producer on the question of whether to replace or not to replace an actor. Shepard Traube, a founder and past president of defendant, and the defendant's witness, was asked whether a Director may be discharged "for cause" if he did not accept

a Producer's judgment as to whether to replace or not to replace an actor. His answer was that this did not give grounds for discharge "for cause". (156A-157A)

There was a considerable amount of testimony at the trial concerning when a Director could be discharged "for cause", and when his discharge would be "not for cause". The defendant's witnesses testified that examples of discharge "for cause" would be if the discharge were because the Director came to rehearsal in a condition unable to direct, or was physically abusive; (100A) and discharge "not for cause" would be if the discharge were because the Director will not accept the Producer's instruction as to which actor to rehearse (100A, 332A) or whether to replace or not to replace an actor, or any artistic disagreement. (156A-157A). The parties agreed (Ex. 3, 54A-55A) that the defendant's policy is that if a Director is discharged for cause, he is not entitled to the compensation that would have accrued had he not been discharged; but that if a Director is discharged not for cause, the Director is entitled to his full compensation as though he had not been discharged. The current president of defendant, Lloyd Richards, defendant's witness, testified:

> "If the director is discharged for cause, it is the practice of the industry that that director is not paid beyond that

> point. If the director is discharged without cause, then we expect and it is the practice in the industry, that the director is compensated as though he had not been discharged." (94A)

Thus, on the basis of both the facts agreed to by the defendant, and on the testimony of the witnesses of the defendant, the policy of the defendant and the practice in the theatre industry is that a Director is not obligated to accept the decision of the Producer with respect to whether to replace or not to replace an actor. The actor's employment contract is with the Producer, and therefore the termination of that employment is carried out by the Producer but if the Producer wishes to discharge an actor, or wishes not to discharge an actor - to retain him in the cast, the Director is not obligated to accept the decision of the Producer. There is therefore certainly no control by the Producer in this area over the manner in which the Director performs his work.

The defendant's brief claims that a Director does not possess the power to make final artistic judgments unless that power has been delegated to him by the Producer, and cites Mr. Traube to this effect. But it was Mr. Traube, defendant's witness, who testified:

"Q. So that if a director does not accept the producer's judgment there (to replace or not to replace an actor) he may be discharged for cause, would you say that?

"A. That's not for cause, no, that's just an artistic disagreement." (156A-157A)

Thus, according to Mr. Traube, where there is an "artistic disagreement" the Director has no obligation to accept the "artistic judgment" of the Producer. And this is not limited to the question of whether to replace an actor. A Director is not obligated to accept a Producer's instructions concerning which actor to rehearse (100A, 332A) or how the play should be interpreted (100A, 332A), or on any artistic matter. (156A-157A) Since the Director has the right to reject a Producer's instructions, the Producer has no "right to direct the manner in which the business shall be done" (Singer, supra).

The defendant's brief states that Producers commonly attend rehearsals, and it claims that the Producer exercises control because the Producer may change scenes, may design or redesign the set, may make lighting changes, may instruct a Director when to rehearse an actor or which actor to rehearse, may modify the rehearsal schedule, may design the costumes. Each of these claims is refuted by

the testimony of defendant's own witnesses. Changing scenes, sets or lighting are artistic judgments. It was Mr. Traube, defendant's witness, who testified that a Director does not violate his obligations by rejecting a Producer's artistic judgments. (156A-157A) And it may also be noted that changing scenes or sets or lighting are ways of changing the result, not the manner of doing the work. Under the rule in Taylor (supra) in order for there to be an employer-employee relationship, the employer must have control in both of two areas: (1) control over the result to be accomplished and (2) control over the manner in which the work is done. Having control solely over the result does not change the independent contractor relationship.

The question of whether a Producer has a right to control a Director with respect to when to rehearse an actor or which actor to rehearse was testified to very specifically by defendant's witnesses. Mr. Traube testified at an examination before trial that if a Producer discharged a Director because the latter refuses to follow instructions as to which actor to rehearse, the Producer would have to pay the Director as though he had not been discharged (Ex. 4, 332A) and in the same examination, Mr. Traube testified:

> "Q. So when the director refuses to follow the instructions with reference to either interpretation or rehearsal he is not in violation of his contract as the Society sees it?
>
> "A. That's correct." (Ex. 4, 333A)

Similarly, Mr. Richards testified that discharging a Director because he refused to rehearse an actor designated by the Producer would be discharge "not for cause". (100A) And Mr. Schneider testified that a Director is not in violation of any obligation as known in the theatre if he refused to rehearse an actor designated by the Producer and insisted instead on rehearsing an actor whom he, the Director, wanted to rehearse. (258A) Both were defendant's witnesses. The defendant's brief refers to the testimony of Mr. Schneider to the effect that when a Producer objected to the way he was rehearsing an actor, he was discharged as Director. (253A) But he was paid his fee after having been discharged, and although he did not receive his royalty, it was clearly only because he did not pursue it. (259A) In fact, Mr. Schneider testified that it is the practice in the theatre that a Director who is discharged under such circumstances receives both his fee and his royalties. (259A)

Defendant's brief relies heavily on testimony it submitted that Producers frequently attend rehearsals and participate in the questions of how the play shall be presented. But it is the defendant's witnesses who make it clear that this does not give the Producer control over the

manner in which a Director shall perform his work. In fact, defendant's brief states at page 9-10: "Whether the producer has the power to control the director in making artistic decisions is the relevant issue." The exact wording of this principle is stated in Singer (supra), and restated in Taylor, (supra):

> "The relationship of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished. . . . "

That the Producer does not retain this "right" or the "power" with respect to artistic decisions or with respect to any other manner in which a Director does his work is established by testimony of the defendant's witnesses. Mr. Traube testified, as hereinabove cited, that if a Director is discharged because he refuses to accept a Producer's judgment, "That's not for cause, no, that's just an artistic disagreement." (157A)

Whether a Producer has the power or the right to control a Director depends on whether the Director must follow the Producer's instructions. The defendant's witness, Cy Feuer, testified specifically on this:

> " . . . I know that with an actor for instance if you tell an actor to do something he doesn't want to do it, you can fire him without paying him. . . ." (177A)

An actor is an employee and therefore must accept the instructions given to him as to how he should perform his work. And Mr. Feuer also testified:

> "Q. But if he (the Producer) did let the director go (where there is a dispute between the Producer and Director and both are adamant with respect to their diverse positions) he (Producer) would have to pay him (Director) under the rules of the industry now; is that right?
>
> "A. Yes." (186A)

This is the clear distinction between an employee and an independent contractor: the actor, because he is an employee, is obligated to accept instructions as to how to do his work; the Director, since he is not an employee, is not obligated to accept instructions as to how to do his work.

POINT II

CONTROL OF BUDGET DOES NOT CONSTITUTE CONTROL OVER MANNER OF PERFORMING WORK

Defendant's brief argues that the Producer controls the budget and therefore and thereby controls the Director. But the person for whom the work is done is always the person who has the right to spend or not spend monies. Where an owner engages a general contractor to do construction work, the general contractor has no right to spend any monies beyond those authorized by the owner;

he nevertheless is an independent contractor since the manner in which he performs his work is not subject to control. A doctor cannot spend monies for tests or treatment beyond that which his patient agrees to spend. A doctor and a Director can each recommend or urge expenditures by the patient or Producer, but the decision is made by the person for whom the work is done; the independent contractor status remains in both cases.

The defendant's brief contends that the Producer can indirectly control the Director as by not making funds available at the time a Director wants them; for example, not making funds available for stage properties at the times the Director wants them, or by not allocating funds for the number of actors the Director would want. This can have no connection whatsoever with the question of whether the Producer controls the manner in which the Director does his work. A plumbing contractor may urge the owner to install brass plumbing instead of cast iron just as a Director may urge that there be ten actors instead of six. If the owner refuses to allocate the larger amount of money, the plumber will have to put in cast iron, but the manner in which he does the installation is not controlled and he therefore remains an independent contractor. In fact, a Producer may notify a playwright that he will not produce the play unless the cast

is reduced from ten to six actors. If the playwright wants the production to go ahead he must accede, but there is no dispute but that a playwright is an independent contractor. (Ring v. Spina, 148F 2d 647) A Director cannot spend a Producer's money any more than any other independent contractor can spend the money of the person for whom he performs work. The independent contractor relationship remains in both cases.

POINT III

THE FACT THAT A DIRECTOR HAS NO OBLIGATION TO FOLLOW THE INSTRUCTIONS OF A PRODUCER WITH RESPECT TO THE MANNER OF PERFORMING WORK INDEPENDENTLY OF OTHER ARGUMENTS ESTABLISHES THE DIRECTOR AS AN INDEPENDENT CONTRACTOR

The defendant's brief postulates the plaintiff's position to be that a Director is an independent contractor because the Producer must pay him in full even though he discharges him. The defendant then attacks this postulate by claiming that first, it is based on hypotheticals not actually existent in the theatre; and second, even if it were based on fact it did not establish a Producer's lack of control over a Director.

It is submitted that both of defendant's arguments are untenable. Defendant's claim that discharge of a Director is so rare as to be hypothetical is demonstrated

to be groundless by the testimony of the defendant's witnesses. Mr. Richards, the current president of defendant, was questioned by the Court on this subject and answered as follows:

> The Court: Have you ever been discharged?
>
> Witness: Yes sir, I have.
>
> The Court: Without cause? I mean, both without cause and --
>
> Witness: Yes, sir.
>
> The Court: And you were paid thereafter?
>
> Witness: Yes, I was
>
> The Court: Has that happened very often to you?
>
> Witness: No, it hasn't happened very often to me but it happens quite a bit in the industry. (94A)

In fact, six of the defendant's witnesses were Directors, and five of them testified that they had been discharged. (94A, 124A, 212A, 215A, 253A, 260A)

The defendant's brief also argues that the trial record is devoid of any supporting evidence of a Director being discharged for refusing to accept a Producer's orders, and that the plaintiff testified that he knew of no case where a Producer discharged a Director because of a disagreement about the amount of rehearsal time, concerning the stage

business that would be used, or similar matters. The fact is that because it is recognized in the theatre that in these areas the decisions are the province of the Director and are not subject to control by the Producer, it is not to be expected that there would be a discharge for any of these reasons. This confirms that the practice in the industry is that a Producer does not have the right to control the Director, and confirming this lack of control is the practice and policy in the industry that where discharge does occur because a Director rejects a Producer's instructions, the Director must be paid as though he had not been discharged. (54A, 94A, 100A, 157A, 258A, 332A, 333A)

The defendant's brief states that the defendant cannot point to any decision in which the Producer does not have the power to overrule the Director. Plaintiff points to the testimony of defendant's witnesses to show that the Producer does not have that power in any artistic or other area concerning the manner in which Director performs his work. Everyone of the defendant's witnesses who was questioned on the subject testified that a Director was not obligated, under the practice in the theatre, to accept the instructions or decisions of the Producer. If the Director does not have that obligation to follow an order, the Producer cannot have the right to control the Director.

The defendant's second argument is that even if a Director must be paid in full when discharged for rejecting a Producer's order this does not evidence independent contractor relationships. The defendant misconstrues plaintiff's argument concerning the requirement by industry practice and policy that a Director must be paid in full if discharged not for cause. The defendant apparently agrees that the question is whether a Producer has the right to control the manner in which a Director performs his work. The plaintiff's argument is not that the requirement to pay the Director means per se, that the Director is an independent contractor; but the argument is that the fact that a Producer must pay the Director if the Director is discharged for rejecting a Producer's orders proves that the Producer does not have the right to control the Director. This follows from facts which are not in dispute:

The defendant concurs, in an amendment to his agreed statement of facts, that if a Director is discharged without cause, he must be paid as though he had not been discharged; if he is discharged for cause he is not entitled to compensation after the discharge. (54A) That is the practice in the theatre industry, as defendant's witnesses consistently testified. (259A, 186A, 382A, 94A) Defendant's

brief argues that a Director should be paid if discharged because of an artistic disagreement inasmuch as there are no objective criteria to determine who is right and who is wrong in the case of differing artistic judgments. But the question is not who is right in the decision; the question is who has the right to make the decision regardless of whether it is right or wrong. The defendant's brief itself states (page 9-10) - "Whether the producer has the power to control the director in making artistic decisions is the relevant issue." The defendant seeks to justify the Producer's lack of power to control a Director's artistic decision by arguing that the Producer may be wrong. Concededly, he may be wrong, but where there is an employer employee relationship, the employer has the right to control the manner of work of the employee even if the decision would be agreed by any objective person to be wrong. Mr. Feuer, the defendant's witness, testifies, as quoted hereinabove, that if you tell an actor to do something and he does not want to do it, you don't have to pay him. (177A) and Mr. Feuer also testified that in the case of a Director you do have to pay him (186A). The artistic judgment with respect to the actor may be just as wrong as with respect to the Director. But an employee has an obligation to accept the instructions of an employer. Defendant's argument confirms

that a Director does not have an obligation to accept the instructions of a Producer; therefore a Director is not an employee of a Producer. Thus:

(a) If a Director is discharged "not for cause", under the practice in the industry he must be paid as though he had not been discharged;

(b) Discharging a Director because he and the Producer disagree on an artistic matter or because the Director rejects a Producer's orders would be discharge "not for cause", whereas if a Director is discharged because he violates his obligations as understood in the theatre he may be discharged for cause;

(c) Therefore, when a discharge is "not for cause" it means that the Director has not violated his obligations as practiced and understood in the theatre;

(d) If the Producer had the right to control the Director concerning artistic judgments, or which actor to rhearse, or in any of the areas discussed, the Director would have the obligation to accept the Producer's orders. Since the Director does not have that obligation the Producer does not have the right to control. The defendant seeks to press the completely anomalous arguments that a Producer has the right to control the Director's decision

with respect, for example, to artistic judgments, but that the Director has no obligation to accept those determinations of the Producer. If there is a right to control there is an obligation to obey; if there is no obligation to obey, there cannot be any right to control.

The fact that a Director is entitled to be paid in full if he is discharged for rejecting a Producer's orders proves that the Producer does not have the right to control the Director. And since there is no right to control the Director, the Director is not an employee.

The defendant argues that discharge carries an onus even if the Director is paid in full. This is true in every case where there is an independent contractor relationship. Architects, accountants, lawyers, doctors, general contractors - all are subject to being discharged without cause; they remain independent contractors. The same is true of a Director.

The defendants brief refers to the fact that a Director must report to the theatre or rehearsal hall furnished by the Producer. An independent contractor always goes to where the work has to be done. An accountant goes to the client's office or to the place where the client keeps his books. The farrier goes to the racetrack or other place where the client keeps his horses. They are nevertheless independent contractors.

POINT IV

DEFENDANT IS AN INDEPENDENT CONTRACTOR AND THEREFORE SUBJECT TO THE SHERMAN ACT

The defendant's brief seeks to distinguish between Ring v. Spina, supra, which held that playwrights are not employees, from the case of Directors. Defendant argues that an author delivers a completed work or product whereas, it claims, a Director contributes only services. Even if it were so that only services are contributed, the Sherman Act would apply if the manner of performing the services is not controlled. (Goldfarb v. Virginia State Bar, _____ U.S. _____ (June 16, 1975); American Medical Association v. U. S., 317 U.S. 519.)

It should also be noted that a new product does result from a Director's work. The same play can have different interpretations when presented by different Directors; and a Director does not violate his obligation if he rejects the interpretation of the Producer. (Ex. 4, 333A). A play on the stage is a very different product from the script. Also, the Director adds "stage business" which stage business remains the property of the Director. (101A, 155A) If a Director were an employee, this work product, the stage business, would belong to the Producer.

(Nimmer on Copyright, Sec. 62.2) In Taylor v. Local 7 (supra), the work of the farriers is primarily rendering services but they are independent contractors because the manner in which they perform those services is not subject to control, except to the extent necessary to obtain the result required.

POINT V

TESTIMONY OF DEFENDANT'S WITNESSES ESTABLISHES THAT THE DECISION OF THE LOWER COURT IS CONTRARY TO THE DECISIONS OF THE COURT OF APPEALS OF THE SECOND AND FOURTH CIRCUITS

There has been no contradiction of testimony of plaintiff's witnesses that a Director is not obligated to follow the instructions of a Producer. On the contrary, the defendant's witnesses confirm plaintiff's contentions, by testifying consistently that the practice in the theatre industry does not require a Director to follow the orders of a Producer. Where there is no obligation to accept orders, there cannot, of course, be any right or power to impose orders. Since it is the defendant's witnesses who testified that there is no obligation upon a Director to accept orders, it is submitted that there is no evidence whatsoever in the record to support the conclusion of the

court below that a Director's manner of work is subject to control. The most that was testified to was that Producers participate or intrude in the course of producing or rehearsing a play; but when they do so, it is without any right to control the manner of the work of a Director. It therefore is submitted that the decision of the court below is in error.

POINT VI

THERE IS NO INDISPENSABLE PARTY OTHER THAN THE PRESENT DEFENDANT

The defendant's brief contends that the League of New York Theatres is an indispensable party to this action. It is submitted that there is absolutely no basis whatsoever for this contention:

(a) A major part of this suit seeks to enjoin defendant from its actions (apart from the Agreements) in restraint of trade. These actions include placing plaintiff on an unfair list (blacklisting the plaintiff) and prohibiting its members from rendering services to the plaintiff if defendant claims plaintiff is in default in payment of an arbitration award. The League has nothing to do with this. No one ever suggested that the League participates in the blacklisting. Further, plaintiff seeks to enjoin the

defendant from prohibiting its members from performing services for the plaintiff except in accordance with the terms of the Agreements. With respect to this part of the action, the injunction sought is with respect to actions of the defendant as against the plaintiff himself or as threatened against the plaintiff. Plaintiff makes no claim that the League has threatened injury to him, and plaintiff does not seek any injunction against the League. Plaintiff has demonstrated that the defendant has injured him in prior productions and that there is a significant threat from defendant of further injury to plaintiff in this industry. (44A-46A) None of these claims involves the League in any way.

(b) The Agreements are imposed by the Society upon the entire public or that portion of it that is interested in producing plays, not only upon League members. The defendant has stipulated that all first class productions are directed by its membership which may not accept terms less than those provided for in the Agreements. Directors may contract with anyone regardless of his membership in the League as they do strikingly in the case of the witness David Merrick, a non-member and the producer probably most active in the theatre. (20A, 51 Transcript)

The connection of the League is limited to the fact that the defendant has used its Agreement with the League as a vehicles for the original expression of the minimum terms under which anyone can contract for the services of a Director. It is submitted that any person injured by defendant's imposition of the Agreements may seek injunction, and need not bring in the League which does not impose the Agreements. Plaintiff is such injured person.

(c) Only the defendant has the right to waive the minimum terms. (Ex. 2, Par. 6(e), 301A) The League does not have any such right. Defendant's right, whether exercised or not exercised, if allowed to continue constitutes a combination in restraint of trade. (U.S. v. Trenton, 273 U.S. 392, 397) Plaintiff asks that defendant be enjoined from prohibiting a Director, if engaged by plaintiff, from waiving any of the terms of the Agreements. Since only the defendant exercises the power to waive or not to waive, there is no other necessary party.

(d) A Director is permitted to negotiate for any terms above the minimum set in the Agreements, but the defendant will not permit a Director to negotiate for terms below that minimum. (93A) As the League has no right with

respect to negotiations below the minimum, the injunction would be solely against the defendant, and there is no basis for making the League a party. The League and any of its members would remain free to enter into Agreements with Directors in accordance with the terms specified in the Agreements, if the League or its members so wished.

(e) Plaintiff also seeks a holding declaring the Agreements unlawful and an injunction against the defendant, prohibiting it from enforcing them. For this purpose also, it is submitted that the League is not a necessary party. The Agreements do not set terms under which members of the League and members of the defendant shall enter into agreements; it sets only the minimum terms upon which a Director must insist before agreeing to render services. Thus, there is no protection to the League in the terms of the Agreements, and the League therefore is not an indispensable party. A person is not an indispensable party unless a determination can injure that person. (United Shoe Machinery v. U. S., 258 U.S. 451) The only claim that is made in defendant's brief of possible injuries to Producers is a reference to paragraphs "1(b)" and "10(b)" of the Agreements. (Ex. 2, 298A, 306A) Paragraph 1(b) provides

only that the defendant will not attempt to seek recognition with respect to certain kinds of productions. Paragraph 10(b) provides only that the defendant waives bargaining with respect to subsidiary rights of dramatists and/or Producers. Apparently defendant contends that plaintiff would be injured if the Agreements are declared unlawful and these two provisions therefore lost to the League. The loss of these provisions cannot possibly injure the League, as is clear from several facto·

(i) If the Agreements are held to be unlawful restraint of trade, the defendant would not have the right to set minimum terms either for any of the productions referred to in "1(b)" nor for any of the subsidiary rights referred to in "10(b)". Thus, the League would have, by operation of law, at least as full protection against collective action as paragraphs "1(b)" and "10(b)" claim to offer. Thus there can be no possible injury to the League, and it therefore is not necessary party.

(ii) While it is impossible that it could be lawful to bargain collectively with reference to "1(b)" productions or "10(b)" subsidiary rights if the Agreements are held unlawful, if these clauses were nevertheless considered somehow to be legal and of value to the League,

they would be protected by the separability provision in paragraph 17 of the Agreements which provides that if any provision is held unlawful, the remainder shall remain in full force and effect if separable from the void part. (There is apparently a typographical error on page 15 of the Agreement with respect to severability, but the intention is unquestionably as herein stated.)

(f) That the League is not an indispensable party is also clear from Court holdings. In an action to enjoin defendants from entering into leases containing terms in violation of Section 3 of the Clayton Act, the defendant there contended that the suit must fail for want of indispensable parties, inasmuch as the lessees had not been brought into the action. The defendant claimed there that the lessees were necessary parties because their rights were necessarily adjudicated in enjoining the enforcement of the contracts involved. The Supreme Court held that the lessees were not necessary parties, stating that the relation of indispensable parties "must be such that no decree can be entered in the case which will do justice to the parties before the Court without injuriously affecting the rights of absent parties." The Court went on to state in that case that: "The covenants enjoined were inserted for

the benefit of the lessor and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction which was prayed in the case. We are of the opinion that their presence was not necessary to a decision." (United Shoe Machinery v. U. S., 258 U.S. 451, 456.) In the instant case, it is beyond question that the setting of minimum fees and other minimum terms were for the benefit solely of the defendant and its members since the Agreements provide that they shall not be construed to prevent any Director of choreographer from negotiating and obtaining from any Producer "any better terms and conditions than are provided for in this agreement without limitation." (Ex. 2, Para. 6(c), page 5)

(g) In an action to enjoin enforcement of agreements with respect to exclusivity of access to certain areas by Western Union, the defendant moved to dismiss for want of indispensable parties since other parties to the contract had not been joined. The court denied the motion to dismiss. (U.S. v. Western Union, 53 F Supp 377) It should be noted that defendant's brief contends that the Court in Western Union apparently based its holding on the ground that the government sought an injunction only against defendant's negotiation of future contracts. It is submitted that this is not the

statement in the case. The Court quoted counsel for the government to the effect that "the government requests nothing except an injunction against the defendants, and it asks nothing more . . . The government asks for no relief whatsoever except against these defendants that are before this Court." (U.S. v. Western Union, supra, 380.) The Court then stated that the motion to dismiss was overruled. Other parties to the agreements were not necessary. Similarly in the instant case, plaintiff seeks to enjoin only the defendant herein. Plaintiff does not contend that the injunction would be enforceable against the League, and certainly the League is not an indispensable party to this action against the defendant.

(h) Defendant relies on Roos v. Texas Co., 23 F 2d 171) Nothing in Roos would indicate that the League in the instant case is an indispensable party. In Roos the plaintiff brought an action to recover one-half of the net income under the provisions of certain oil leases. That half was chargeable with a one-fourth interest in favor of plaintiff's attorneys who had a priority lien but had not been made parties. If the plaintiff there recovered the amount for which it sued, the attorneys would be left to pursue a separate suit for their share, and if they failed to recover in their own suit against the same defendant, would then have to pursue the plaintiff personally.

If plaintiff in Roos recovered, it might thereby destroy the possibility of the attorney lienors from recovering. That differs completely from the instant case. If plaintiff here is successful, nothing prevents the League or any of its members from entering into the agreements it wishes, with any Director, for the same minimum terms as provided in the Agreements. The League cannot possibly be injured if defendant is enjoined from imposing the Agreements against plaintiff herein. It is submitted that Roos is irrelevant to the instant case.

(i) Defendant's argument based on Rule 19 of the Federal Rules of Civil Procedure also is untenable, and for the same reasons as hereinabove shown: an adjudication in the instant action cannot impair any interest the League may have, and does not leave any party subject to any risk of incurring inconsistent obligations.

(j) Defendant's brief cites Washington v. U.S., (87 F 2d 421) as posing four questions as criteria for determining whether a party is indispensable: (1) Is the interest of the absent party distinct and severable? As shown above, the Agreements are not for the protection of the League, which therefore has no interest which can be hurt; and if the League did have an interest, it would be

severable by the terms of the Agreements. (2) Can the Court render justice between the parties in the absence of "such party"? Since the defendant has not shown even a scintilla of injury to the League if the Agreements are held unlawful, such holding could not be unjust to the League. (3) Will the decree be injurious to the absent party? There is no way the League can be hurt by a holding that the Agreements are unlawful. The only two suggestions made by defendant are the provisions in paragraphs 1(b) and 10(b) of the Agreements, and as hereinabove detailed, these give no protection whatsoever to the League. (4) Will the final determination, in the absence of the party be consistent with equity and good conscience? If the Agreements are declared unlawful, only minimum terms will be voided, since there is no limitation on a Director's right to negotiate above the minimum. The League has no right to negotiate below the minimum, even if a Director agrees. There cannot in equity or good conscience be anything detrimental to the League if the Agreements are held unlawful. The League cannot therefore be an indispensable party.

POINT VII

CONCLUSION

Since a Producer has no right to control the manner in which a Director performs his work there is no employer-employee relationship between a Producer and a Director. The defendant, an organization of Directors, is therefore subject to the provisions of the Sherman Act. By setting minimum fees and other minimum terms, the defendant is in violation of the Sherman Act and, it is respectfully submitted, should be enjoined from continuing such violation.

Respectfully submitted,

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Attorney for Plaintiff-Appellant